

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7089

To be argued by

STEPHEN GILLES

By THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE CONTINENTAL INSURANCE COMPANY,

Plaintiff-Appellant,

—against—

HERBERT OFFSHORE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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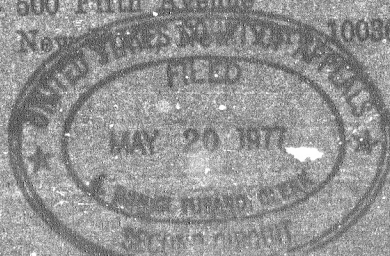
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ORIGINAL

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BRIEF FOR DEFENDANT-APPELLEE

Introductory Statement*

Between 5 p.m. Saturday, December 16, 1972, and 8 a.m. the next Sunday, a barge (Barge No. 136) capsized in eastern Long Island Sound while moored a little more than a mile off Jacobs Point. A crane and equipment were aboard. (FF 17, 44.) That capsizing led to this lawsuit.

* "Continental" is the appellant, "Hersent" the appellee. The following abbreviations are used:

Joint Appendix	—	Jnt. App.
Joint Exhibit Volume	—	Jnt. Ex. Vol.
Findings of Fact	—	FF
Conclusions of Law	—	CL
Plaintiff's Exhibits	—	Pl. Ex.
Defendant's Exhibits	—	Def. Ex.
Record	—	R

References to testimony are to the page of the Joint Appendix or Record on which it appears.

Continental, the insurer of the barge, crane and equipment, declined to pay. On March 19, 1973, it filed an action for a declaratory judgment that it was not obligated to Hersent, its insured, under either of two policies. Only one, the Hull policy, is involved on appeal. Hersent counter-claimed for its losses. (FF 57.) This is Continental's interlocutory appeal from a judgment holding it liable to Hersent. 28 U.S.C. § 1292(3).

The Legal Issues

Continental initially asserted numerous defenses to liability. On appeal, there are only four.

1. The Hull policy contained a typewritten addition called the *Storm and Heavy Weather Plan* (Jnt. Ex. Vol. 57-8).^{*} It described three "Conditions," A, B and C. Each condition purports to identify a set of weather circumstances and, in numbered subparagraphs, to outline procedures to follow if those circumstances arise. Hersent warranted "that one person will be designated responsible for making judgment as to the severity of conditions, and to see that the proper procedures are followed." Hersent "designated" Robert J. Green as the person "responsible for making judgment." (FF 5.)

Continental contends that Hersent failed to comply with subparagraphs B(1), (3) and (4) and that these are warranties (Continental's Point I). The legal issues these contentions raise are:

(i) Does condition B state a warranty?

^{*} The entire Storm and Heavy Weather Plan is printed at pp. 22-4, *infra*.

- (ii) If so, was condition B in effect so that Hersent was obligated to comply with the procedures outlined in subparagraphs B(1), (3) and (4)?
- (iii) If so, did Hersent comply?
- (iv) If not, was a negligent failure to comply covered under the policy?

2. Continental argues (in its Point II) that the capsizing was not "fortuitous" and so not a "peril of the waters" or sea within the meaning of the *perils of the sea* clause of the Hull policy. The trial court concluded that the "proximate cause" of the capsizing was a "storm," and that the storm was a peril within the *perils of the sea* clause. (CL 20.) Continental contests both conclusions. It argues that the storm was not the "proximate cause" of the loss and that since it was "expected," it was not "fortuitous."

3. Continental contends (in its Point III) that there was an implied warranty of seaworthiness in the Hull policy and it was breached. Hersent's position is that there is no implied warranty of seaworthiness in a Hull policy whose coverage is defined by time, or, if there is, it is exceedingly narrow and was not breached here.

4. Continental says that Robert Green was not the "master" of the barge within the meaning of the policy's Inchmaree clause (Continental's Point IV). Continental makes this argument to avoid the coverage that the Inchmaree clause provides against the "negligence" of the insured's "master, mariners, engineers or pilots." If an alleged warranty was breached as a result of Green's negligence and he is a "master," Hersent is protected under the Inchmaree clause. This is not disputed. Continental contends, though, that Green was not a "master," but a "manager," whose negligence was not covered by the Inchmaree clause.

Statement of the Case

Buying the Insurance

Hersent is in the business of marine engineering and marine construction. In the middle of 1972, it was preparing to begin construction of an offshore terminal in Long Island Sound, to be used by tankers. Northville Industries, Inc. hired Hersent for the job. To do it, Hersent leased various pieces of equipment, a barge and a crane. (FF 12.)*

On July 24, 1972, Hersent purchased two insurance policies from Continental. The first, called a Hull policy, insured the barge, the crane and "miscellaneous equipment" for \$436,000. The second, a Protection and Indemnity policy (P & I Policy) insured against other risks. Both policies issued to DeLong of New York, Inc. (DeLong), later renamed Hersent Offshore, Inc. Indorsements changed the name of the insured. (FF 3.)

Hersent paid Continental more than \$29,000 in premiums for the policies. The Hull policy provided coverage from July 24, 1972 through December 24, 1972. (FF 8.)

What the Insurance Insures

Three portions of the Hull policy are central to this appeal. They are:

(a) a clause insuring Hersent against loss caused by the "perils of the waters." This clause is colloquially referred to as the *perils of the sea* clause. (Jnt. Ex. Vol. 54.)

(b) a separate clause insuring Hersent against additional perils not easily categorized. This clause is

* An overview of the barge, prepared by Hersent but introduced in evidence by Continental, appears at Jnt. Ex. Vol. 9.

known as the *Inchmaree* clause because it was added to maritime insurance policies to expand coverage after a British court ruled against an insured in a case involving a vessel named the *Inchmaree*. See p. 16, *infra*.

(c) a typewritten addition called the Storm and Heavy Weather Plan. (FF 5.) (Jnt. Ex. Vol. 57-58.)

HCS Approval

At the time the Hull policy became effective, July 24, 1972, the barge was in port at Carteret, New Jersey. Under endorsement No. 1 of the Hull policy (Jnt. Ex. Vol. 61), Hersent "warranted" that it would get approval from Hull & Cargo Surveyors, Inc. (HCS) before the barge was towed to its offshore work site in Long Island Sound. Marine Office Appleton & Cox (MOAC) owns HCS. Continental owns MOAC. (FF 10.) About 75 percent of HCS's business is from Continental. (Jnt. App. 76a.)

Hersent complied with endorsement No. 1. HCS conducted three surveys (FF 15) and reported its findings to Continental. (FF 11.) A report dated July 20, 1972 from Captain Smith of HCS to Continental (Jnt. Ex. Vol. 72) states that the barge was inspected on June 30, 1972. Its physical condition is extensively described. The report concludes that the barge is in "sound condition." Captain Smith testified that the barge was "adequate" for its intended service. (FF 15.) (Jnt. App. 78a.) A second report the next month is also favorable. (Jnt. Ex. Vol. 75.)

The trial court, based upon these reports and on other information in the record (FF 4A), concluded that the barge was fit for its intended service, both on the effective date of the Hull policy, July 24, 1972, and before it left Carteret for its work site on August 4, 1972. (FF 12, 13, 14.)

***The Barge at the Work Site:
August 4, 1972-December 14, 1972***

Master of the Barge. Robert J. Green

was the Hersent employee who was the superintendent in charge of the entire project and the project included the use of Barge No. 136 [primarily as a work platform from which the construction went on (Jnt. App. 222a)]. Mr. Green had supervised similar construction work for Hersent and DeLong for about twenty years. His duties required his presence on barge No. 136 on a daily basis when barge No. 136 was being worked, which was normally a five-day week.

* * *

As project manager for Hersent at the Northville Industries job site, Mr. Robert Green's responsibilities included the scheduling and coordination of the construction of the terminal, as specified in the pertinent specifications and drawings. . . . Mr. Green was also responsible for the shoreside aspects of the project. (FF 18, 19.)

Based on these factual findings, which were based on trial testimony (e.g., Jnt. App. 93a, 191a, 194a, 210a, 217a), the court concluded that Green "occupied the position of master" of the barge "while aboard the barge, within the meaning of the Inchmaree clause of the Hull policy." (CL 8.)* The trial court also concluded that Green was the person designated by Hersent as "responsible for making judgment as to the severity of conditions [in the Storm and Heavy Weather Plan] and to see that the proper procedures are followed." (FF 5.)

* Although the legal conclusion regarding Green's status as master is disputed by Continental, no claim is made that Hersent lacked diligence in appointing Green "superintendent in charge of the entire project" or in designating him the person "responsible for making judgment" under the Storm and Heavy Weather Plan.

Workers on the Barge. Numerous people worked under Green. Dock builders did the rigging and welding work; engineers operated construction equipment, including the crane, two winches, an air hammer, a diesel hammer, a compressor and a generator. On the barge, working directly under Green, was Frank Carr, whose duties included allocating the work and overseeing its proper performance. Green supervised Carr. (FF 20, 21, 22.) (Jnt. App. 210a, 148a.) Shoreside was Joseph Miller, Hersent's project coordinator and assistant controller.

Lengthening the Boom. The barge made occasional trips to Mattituck Inlet between August and December 1972. It last returned to the construction site December 4, 1972, with the crane and equipment on board. During one of its trips to the Inlet, the boom on the crane was lengthened from 160 to 170 feet. As a result, the method of securing the boom into its crotch changed. (FF 24, 24A.) (Jnt. App. 212a, 214a, 199a.) An HCS survey report had earlier informed Continental that the boom might be extended from 160 to 170 feet. (FF 24B.) (Jnt. App. 91a.) Captain Smith of HCS testified that the boom could be properly secured even with the ten foot extension. (Jnt. App. 80a.) The Court concluded (CL 10) that the change in the boom's length did not violate condition B(1), which states that "if conditions are forecast to be quite severe, crane booms will be lowered and cradled, and secured in place." (Jnt. Ex. Vol. 57.) The boom could still be "secured in place" (CL 10; Jnt. App. 80a) and was (Jnt. App. 217a, 214a; 234a) (FF 24A, 26) (Pl. Ex. 11A).

Thursday, December 14, 1972

On the evening of December 14, 1972, the barge was moored on a north/south axis in Long Island Sound. It was south of the platform it was constructing and north

of Jacobs Point, Long Island. The southerly mooring lines were approximately 100 to 150 feet long and crossed. The northerly mooring lines were about 1000 feet long and breasted. (FF 27; Jnt. App. 75a-76a; Pl. Ex. 7, 7B.)* When the crew left the barge on the evening of Thursday, December 14, 1972, the weather was good and the seas were "flat" and "calm." (Jnt. App. 189a, 197a.)

Friday, December 15, 1972

By the morning of Friday, December 15, the weather had changed and the crew went to the barge to prepare it for the inclemency. (FF 33; Jnt. App. 149a, 203a, 215a.) They remained on the barge until 9:45 that morning, when strong winds (20 knots) and rough seas made it dangerous to stay longer and impossible to work. (FF 35; Jnt. App. 149a, 183a.)

Before leaving, Andrew Voltmann, the crane operator, lowered the boom between the 12-inch and 18-inch high welded steel uprights on the sides of the cradle and engaged the crane's house lock and swing brake. (FF 26; Pl. Ex. 11A.) The house lock and the swing brake prevent the boom from turning and, in fact, after the capsizing, when the boom was recovered, it had suffered no visible damage. (FF 26; Def. Ex. X.)

There had been some minor dewatering of various compartments on the barge the day before, after which Green had checked the "watertight fittings and found that they had all been closed following" the dewatering process. (FF 30; Pl. Ex. 7.) On December 15, all watertight compart-

* Since the barge is a "square rake-ended" and "flat-bottomed" vessel (FF 4A), there was some uncertainty which end of the barge was the stern or "aft" and which was the bow or "fore." (Jt. App. 69a, 198a.) For this reason, directional references are used. This relates to Continental's Point I and will be discussed below.

ments on the barge were closed before the crew left the barge. (FF 37; Pl. Ex. 7.)

Thomas Doyle, a former welder and dockbuilder for Hersent, called by Continental, testified to weather conditions at the barge on the morning of Friday, December 15:

I can tell you that the weather conditions were rough because the water went over my head and I was 8 feet lying on my belly in on the side of the barge welding the pad eye.

The Court: The water came 8 feet—

The Witness: I was in 8 feet from the edge, I was welding a pad eye down. I was welding on my belly about six inches off the deck laying on two planks and the water completely covering me.

* * *

The Witness: . . . in other words, the water literally came over me or up over my mask. I didn't see the weld because the water actually engulfed me, completely covered me. [Jnt. App. 149a.]

John Mayer, the Hersent employee who operated the crewboat that took the men to the job site (Jnt. App. 181a), testified similarly. He also stated his fear that unless the crew was removed quickly, removal might become impossible. (Jnt. App. 183a.)

When the crew left the barge Friday, December 15 at 9:45 a.m., it remained moored in substantially the same position as on Thursday. (FF 34.) The court found this manner of mooring was "common and reasonable for a construction barge when actually in use and it is not uncommon for construction barges to be left so moored when the vessel is not manned." (FF 28.) This finding is based

on the testimony of Captain Wildner. (Jnt. App. 159a, 170a-171a, 179a.)

Before leaving the barge on Friday, December 15th, Carr testified that Green asked him for an opinion on whether "we should tow the barge back to Mattituck because the forecast for the weekend was twenty knot winds, and it was decided we leave it there because there wasn't enough wind to warrant going back to Mattituck." (Jnt. App. 216a.) After the crew left the barge, the National Weather Service predicted "small craft warnings changed to gale warnings at 11:00 a.m. Northeast to east increasing to 30 to 40 knots with higher gusts later this afternoon and tonight. Northwesterly winds 20 to 30 knots with higher gusts Saturday." (FF 39; Def. Ex. O.) Green instructed Captain Wildner, of the tugboat Paumanok, to remain on standby alert on Friday and Saturday. Captain Wildner remained on standby until 2:30 p.m. Friday and from 7:00 a.m. to 3:00 p.m. Saturday, December 16. He last saw the barge from shore with binoculars between 3:00 and 4:00 p.m. Saturday and concluded that it was "riding in the weather very well . . . it was just riding the way the sea was riding by it." (Jnt. App. 156a; FF 43.) In one or two telephone conversations Saturday afternoon, Wildner told Green the barge was "in good condition." (FF 43; Jnt. App. 158a.)

Between 5:00 p.m. Saturday, December 16 and the following Sunday at 8:00 a.m., the barge capsized at its work site. (FF 44.)

The Cause of the Capsize

This mixed question of law and fact is discussed below (see pp. 17-21). Here, we mainly note the court's factual conclusion.

The court held that three factors caused the capsize:

- (a) a storm of gale proportions;
- (b) taking on of water along one side, causing the barge to list severely; and
- (c) the action of the crane and boom sliding toward the listing side of the barge. (FF 46.)

The court concluded that these "factors were somewhat inter-related. The taking on of water was due in great part to the storm. The sliding off of the crane and boom was caused by the storm and the list, which resulted from the taking on of water. All three of the foregoing items in combination caused the capsize." (FF 46.)

Since the barge was found in a semi-submerged condition after the capsize, and since its hull was watertight, the court concluded that it must have taken on "substantial amounts of water before it capsized." The fact that the barge was riding low in the water after the capsize also supported the same conclusion. (FF 47.) The court inferred that the barge was able to take on water because the "four-point mooring arrangement limited the extent to which [the barge] could swing into the wind." (FF 48.) But the court also concluded that the additional water taken on as a result of the four-point mooring arrangement was not "a competent producing cause, or an immediate cause of the capsizing of [the barge], although it might have expedited the occurrence." (FF 51.) This finding is predicated directly on testimony of plaintiff's expert, Martin Tiedemann, that:

I think the four-point mooring is what allowed you to take water on board, or—a heck of a lot *more expediently* than if she had been on a two-point moor. (Jnt. App. 106a.) (Emphasis added.)

Defendant's expert, Avrum Freelund, and Tiedemann both concluded that the list caused by the flooding could not alone have capsized the vessel. (Jnt. App. 113a, 102a, 105a.) In short, both experts agreed that the capsizing would not have occurred but for the sea and weather conditions. (Jnt. App. 101a-102a; 113a). The court concluded that the "proximate cause" of the loss, which the court defined to mean "the dominant and effective cause producing [the] loss, or that cause which was most nearly and essentially connected with the loss as its efficient cause, [was] in this instance . . . the storm, which was a peril included in the Perils of the Sea Clause" of the Hull policy. (CL 20.)*

Additional facts, relevant to particular arguments, are discussed under those arguments.

* It is noteworthy that Hersent's expert, Freelund, reviewed extensive materials prior to trial (Jnt. App. 109a), caused the production of a detailed diagram of the barge (Jnt. Ex. Vol. 9), did extensive mathematical computations (Jnt. App. 111a) and factual investigations (Jnt. App. 110a) and made a computerized righting arm curve calculation (Jnt. App. 113a). Wherever Freelund had a question, he would assume the condition less favorable to Hersent (Jnt. App. 111a). On the other hand, Tiedemann, Continental's expert, did not do any mathematical calculations (Jnt. App. 103a; 104a), did not know the weight of the boom (Jnt. App. 104a), did not hypothesize a weight for the boom, but rather made his observation "from the picture I had seen of the barge" (Jnt. App. 104a), and did not make any calculations of righting arm curves (Jnt. App. 106a).

ARGUMENT

I.

Hersent had the initial burden of proving that its loss resulted from a peril insured against under the Hull policy. Continental then had the burden of proving that it was not liable on the policy because Hersent breached one or more of the policy's exceptions to coverage.

Three of Continental's four arguments contend that Hersent breached three alleged exceptions to the Hull policy's coverage. These are breach of an alleged express warranty (Point I), breach of an alleged implied warranty of seaworthiness (Point III), and lack of due diligence by a Hersent "manager" (Point IV). Continental also alleges (in its Point II) that the loss did not occur as the result of a "fortuitous . . . action of the elements." A "fortuitous . . . action of the elements" is one of the perils covered under the *perils of the sea* clause of the policy. The Inchmaree clause covers additional perils. Hersent had to show that a covered peril proximately caused its loss.

Since this case may depend as much on the absence as the presence of evidence, we briefly review burden of proof, including the effect of the fact that it was Continental who initially commenced this action for a declaratory judgment.

As a general rule, most federal jurisdictions place the burden of proof on the underwriter in an action for a declaration that the company is not obligated to the insured. Moore's, *Federal Practice* § 57.31[2] (and cases at 57-269, n.8). *Sims v. Amos*, 365 F. Supp. 215 (N.D. Ala. 1973) *aff'd sub nom. Wallace v. Sims*, 415 U.S. 902 (1974).

The leading Second Circuit decision is *Preferred Accident Insurance Co. of New York v. Grasso*, 186 F. 2d 987 (2d Cir. 1951). Applying Connecticut law, the Court held that burden of proof does not shift because an insurance company brings an action seeking a declaration of non-liability. Borchard, *Declaratory Judgments* 404-409 (2d ed. 1941).

The *Grasso* Court applied Connecticut law because the action was based on diversity. *Palmer v. Hoffman*, 318 U.S. 109 (1943). Although the present case is not based on diversity, it is arguable that New York law should apply. *Wilburn Boat Co. v. Firemen's Fund Insurance Co.*, 348 U.S. 310, 316-17, 320-21 (1955) (state substantive insurance rules apply in maritime insurance cases); *Palmer v. Hoffman*, *supra* (burden of proof is "substantive"); *but cf. Battery Steamship Corp. v. Refineria Panama, S.A.*, 513 F. 2d 735, 738-39 (2d Cir. 1975).

Burden of Proof on Issues Here

It is probably not necessary, however, to determine whose law applies. Cases from federal and state jurisdictions agree on the allocation of burden of proof with regard to the issues here, whatever the form of action. An insured has the burden of proving a loss proximately caused by a peril within the policy and the underwriter has the burden of proving that it is free of liability because of some exception to the policy. *Northwestern Mutual Life Insurance Co. v. Linard*, 498 F. 2d 556 (2d Cir. 1974); *Ruffalo's Trucking Service, Inc. v. National Ben Franklin Insurance Co. of Pittsburgh*, 243 F. 2d 949 (2d Cir. 1957) (New York law); *Saskatchewan Government Insurance Office v. Spot Pack*, 242 F. 2d 385 (5th Cir. 1957); *Lemar Towing, Inc. v. Firemen's Fund Insurance Co.*, 352 F. Supp. 652 (E.D. La. 1972), *aff'd on op. of lower ct.* 471 F. 2d 609 (5th Cir. 1973); *Jefferson Amuse-*

ment Co. v. Lincoln National Life Insurance Co., 409 F. 2d 644 (5th Cir. 1969); *Fidelity & Casualty Co. v. Phelps*, 64 F. 2d 233 (4th Cir. 1933); *Piedmont & Arlington Life Insurance Co. v. Ewing*, 95 U.S. 377 (1875); *Carter Tug Service v. Home Insurance Co.*, 345 F. Supp. 1193 (S.D. Ill. 1971); *Texaco, Inc. v. Universal Marine, Inc.*, 400 F. Supp. 311 (E.D. La. 1975); *International Paper Co. v. Continental Casualty Co.*, 35 N.Y. 2d 322, 361 N.Y.S. 2d 873 (1974); *Prashker v. United States Guarantee Co.*, 1 N.Y. 2d 584, 154 N.Y.S. 2d 910 (1956); *Wagman v. American Fidelity & Casualty Co.*, 304 N.Y. 490, 109 N.E. 2d 592 (1952).

If the insured proves that "the loss [was] 'proximately caused' by the peril insured against and claimed under" (498 F. 2d at 561) then "all affirmative defenses . . . must be established by the insurer." 498 F. 2d at 563. *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F. 2d 989, 999 (2d Cir. 1974) (insurer must prove "cause of loss came under one of the terms of exclusion"). *Lemar Towing, Carter Tug Service, Saskatchewan Government Insurance Office*, and *Texaco* establish that the underwriter must show unseaworthiness, if that is an issue. *Carter Tug Service* requires the insurer to prove lack of due diligence. The burden of proving breach of warranty is also on the underwriter. *Fidelity & Casualty*.

Under Point II, below, Hersent shall show that the district court properly concluded that Hersent met its burden.

II.

Hersent proved that an insured peril caused its loss.

Continental argues (in its Point II) that the capsizing "was not a fortuitous event occurring through extraordinary action of the elements" and that Hersent has not proved that its loss occurred as a result of an insured peril. Hersent disagrees. It has proved that its loss occurred as a result of perils insured against under the *perils of the sea* clause or under the Inchmaree clause of the Hull policy.

The Hull Policy

The Hull policy contains two independent clauses providing coverage. The *perils of the sea* clause insures against loss resulting from the "perils . . . of the waters named herein." The Inchmaree clause insures against, among other things, the "negligence of master, mariners, engineers or pilots." The Inchmaree clause contains a *proviso* negating coverage under that clause if a loss has "resulted from want of due diligence by the assured, the owners or managers of the vessel, or any of them." An absence of due diligence, however, will not preclude coverage for a loss caused by a peril in the *perils of the sea* clause. *Frederick Starr Contracting Co. v. Aetna Insurance Co.*, 285 F. 2d 106, 109 (2d Cir. 1960). Hersent contends that its loss proximately resulted from a storm, an insured peril within the meaning of the *perils of the sea* clause. To the extent that negligence contributed to the loss, the negligence belonged to the "master, mariners, engineers or pilots" within the meaning of the Inchmaree clause.*

* For discussion of the origin of the Inchmaree clause, see *Allen N. Spooner & Son, Inc. v. Connecticut Fire Insurance Co.*, 314 F.2d 753, 757 (2d Cir. 1963); *Saskatchewan Government Insurance Office v. Spot Pack*, 242 F.2d 385, 391 (5th Cir. 1957).

The Meaning of "Proximate Cause" In Maritime Insurance Policies

Hersent must prove that its loss was proximately caused by a peril insured against. Proximate cause refers to the "dominant and effective cause producing the loss" or that cause " 'which was most nearly and essentially connected with the loss as its efficient cause.' " *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 368 F. Supp. 1098, 1141 (S.D.N.Y. 1973) *aff'd* 505 F.2d 989, 1006-07 (2d Cir. 1974). The first quoted language comes from *United States v. Standard Oil Co. of New Jersey*, 178 F. 2d 488, 494 (2d Cir. 1949) *aff'd* 340 U.S. 54 (1950) and the second appears on appeal of the same case. 340 U.S. at 58. In *Lanasa Fruit Co. v. Insurance Co.*, 302 U.S. 556, 562-563 (1938), the Court said:

The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not yet destroyed it. . . . [Quoting Lord Shaw in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1918), A.C. 350, 368-71.]

The *Lanasa* Court also noted that while talk about the

chain of causation [was a] handy expression, [the metaphor was] inadequate. Causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes . . . was the proximate and which was the remote cause. [302 U.S. 562-63] [See also *Goodyear Rubber & Supply, Inc. v. Great American Insurance Co.*, 545 F.2d 95 (9th Cir. 1976).]

Therefore, Hersent meets its burden of proving that an insured peril caused the loss once it shows that the immediate and efficient cause of the loss was a peril of the sea—in this case a storm—regardless of what other, remote or incidental causes of the loss exist.*

The Meaning of "Fortuitous"

A loss is caused by a peril of the sea if it is caused "by the fortuitous action of the sea." *New York, New Haven and Hartford Railroad Co. v. Gray*, 240 F.2d 460, 464 (2d Cir. 1957). *Allen N. Spooner & Son, Inc., supra*, 314 F.2d at 756.

In *Allen N. Spooner & Son, Inc., supra*, a guy wire parted after the barge was caused to tilt by the swells of a large passing vessel. The Court held that since the swells "which caused the derrick on the [barge] to buckle were a 'fortuitous action of the sea,' they were therefore within the scope of the 'Perils' clause." 314 F. 2d at 756.

In *Gray*, sea water leaked into a car float, which caused the vessel to list and settle, which in turn caused some of the railroad's cars and their cargo to slide into the river, after which the vessel itself lurched and other cars and their cargo fell into the river. The loss was held to have resulted from a peril of the seas. The Court said:

"It is enough that damage be done by the fortuitous action of the sea. For instance, where cargo was damaged by the incursion of seawater through a hole in a pipe gnawed by rats, the House of Lords held this to be a peril of the sea." That the sea is calm makes

* Cases such as *J. Gerber & Co. v. S.S. Sabine Hawaldt*, 437 F. 2d 580, 588 (2d Cir. 1971) are not applicable in searching for a definition of "perils of the sea." *Gerber* was an action by a shipper against a carrier. "Perils of the sea" has a different meaning in the insurance context. *Allen N. Spooner & Son, Inc., supra* at 757 n.3.

no difference. Negligence, whether or not "gross," but for which the accident would not have occurred, will not serve as a defense to such a policy. [240 F. 2d at 464.]

The *Gray* Court also quoted from *Smith v. Scott*, 4 Taunt. 125 (Lord Mansfield):

I do not know how to make this out not to be a peril of the sea. What drove the Margaret against the Helena? The sea. What was the cause that the crew of the Margaret did not prevent her from running against the other? Their gross and culpable negligence; but still, the sea did the mischief. [240 F. 2d at 465.]

In *Hecht, Levi & Kahn, Inc. v. New Zealand Insurance Co.*, 121 F. 2d 442 (2d Cir. 1941), the Court, holding that a ship's "pounding in the storms she encountered" to be a sea peril, stated that the words "perils of the sea,"

while they do not include those injuries which are the run of all voyages, they certainly do include occasional visitations of the violence of nature, like great storms, *even though these are no more than should be expected*. [Emphasis added.]

See also Gilmore and Black, *The Law of Admiralty* 72-73 (2d Ed. 1975).

Judge Rifkind wrote in *Compania Transatlantica Centroamericana, S.A. v. Alliance Assurance Co.*, 50 F. Supp. 986, 991 (S.D.N.Y. 1943) ("small waves" held a peril of the sea):

... I think the casualty was the result of a *fortuitous* entry of the sea water; that it was an event which *might* and did happen, not one which *must* happen.

The very fact that the vessel had been voyaging without mishap attributable to the valve . . . is proof positive that the casualty was in the realm of the *possibilities* and not of the *inevitable*s. [Emphasis added.]

Continental is wrong when it argues that the storm was not "fortuitous" because it was not "unexpected" that there would be a "northeaster" in the area during the month of December (p. 19 of Continental's brief). If a northeast storm was not a peril insured against, why did Continental set out four procedures in the storm and heavy weather plan containing steps to follow in case of a northeast storm? Furthermore, as the cases cited above (pp. 19-20) show, the fact that a peril is not unexpected does not remove the element of fortuity. This is expressly the holding in *Hecht, Levi & Kahn, Inc., supra*, and *Compania Transatlantica, supra*. In *Compania*, small waves were held a peril of the sea. The *Hecht* Court wrote that storms are a fortuitous occurrence "even though these are no more than should be expected."

People take out insurance specifically to cover losses from perils that are foreseeable but not inevitable. The probability of occurrence determines the premium. In this regard, it is noteworthy that Hersent paid nearly \$30,000 in premiums for a half-year of insurance. The size of the premium is "relevant to the construction of the policy." *Pan American, supra*, 505 F. 2d at 1001 n. 10. It ill behooves Continental to charge this sum and then, after a loss, claim that Hersent was not insured against the major threat to its barge—storms.

The Record Supports the Finding Below That the Storm Proximately Caused the Loss

Judge Goettel found as a matter of law (CL 20) that the "proximate cause of a loss, within the meaning of maritime insurance contracts, means the dominant and effective cause producing a loss, or that cause which was most nearly and essentially connected with the loss as its efficient cause." This is the language of *United States v. Standard Oil Co. of New Jersey*, *supra* and the other cases cited above. Judge Goettel then concluded (CL 20) that "in this instance, the proximate cause was the storm, which was a peril included in the perils of the sea clause."

Continental is incorrect in contending that Judge Goettel "erred in not finding that it was the precapsized flooding [that] brought about the barge's unseaworthiness" (pp. 18-19 of Continental's brief). This argument shows a misunderstanding of the effect of unseaworthiness on the coverage provided by a Hull policy with an Inchmaree clause, an issue discussed under Hersent's Point IV below. But, in any event, the record supports the trial court's finding that the storm was the cause "most nearly and essentially connected with the loss as its efficient cause." (Jnt. App. 101a-102a, 113a-114a.)

Finally, the cases Continental cites under Point II of its brief are inapposite. They either cite broad rules of law only or are distinguished as dealing with situations where the loss resulted from wear and tear on the insured vessel in ordinary seas.

III.

Hersent did not breach express warranties in the "Storm and Heavy Weather Plan" of the Hull policy because (1) the plan contains no warranties; (2) if it does, the warranties were not in effect; (3) if they were, the warranties were complied with; and (4) any negligent failure to comply with the warranties is protected under the Inchmaree clause of the Hull policy.

The Storm and Heavy Weather Plan

A typewritten addition to the Hull policy, called the Storm and Heavy Weather Plan, is printed in full.

In respect to the barge "Hughes #136" it is warranted by the Assured that all of the conditions set forth in the Storm and Heavy Weather Plan attached and forming part of this policy will be strictly adhered to and complied with.

CONDITION A:

This condition is considered a major alert condition with a hurricane approaching Hatteras and the possibility of passing through or in the vicinity of the area.

1. All work to close down the boom be nested securely on cradles and lashed.
2. At least one tug with a minimum of 1000 H.P. will be called in to take vessel in tow.
3. While awaiting tug, all mooring lines will be bayed-off and released, with vessel lying to her anchor only, ready for tow.
4. Tow will be then made to a safe berth and harbor, preferably Port Jefferson. Here vessel will be

safely anchored or made fast alongside a protected pier.

5. There will be an experienced riding crew aboard to handle lines during tow, when anchoring or berthing, and during the storm condition.

CONDITION B:

Defined as an alert condition with a hurricane or north-east storm well offshore. Heavy swells can be expected from the East and Northeast, causing a vessel moored to roll heavily.

1. If conditions are forecast to be quite severe, crane booms will be lowered and cradled, and secured in place.
2. Gear and equipment on deck will be secured against movement.
3. Aft mooring lines will be slacked off enough to allow vessel to swing head into the seas and swells for better riding. If possible, vessel will be allowed to ride to head line moorings and anchor with fairly equal strain on each unit.
4. An alert will be given for tugs to stand-by in case conditions become unduly severe and assistance be required.

CONDITION C:

Defined as a warning status with severe squall weather.

1. Crane booms will be secured in place, with hoist gear and runners secured. Extra guys, if warranted, will be used for properly securing mast and boom against movement.
2. Loose gear and equipment will be secured on main deck.

3. Tugs will always be available in the event conditions deteriorate and assistance be needed.

It is further warranted by the Assured that one person will be designated responsible for making judgment as to the severity of conditions, and to see that the proper procedures are followed.

It is understood and agreed that the Company, at any time, may revise or add to the conditions of this plan by issuance of an endorsement.

Attached to and forming part of Policy No. HC 01 27 81 of the CONTINENTAL INSURANCE COMPANY.

In the course of the trial, given the difficulty in applying some of the terms of the Plan to the events before it, the trial judge said to Continental's counsel:

I don't know who plugged that little provision out of some other policy and inserted it in there, but it was not a very sensible thing to do, and you are bound by the language in the policy, which, unfortunately for you, strictly construed—and that is the way we have to do it—reads against you. [R 184.]

and at another point, in colloquy about the meaning of the word "secure" in condition B(1) of the Plan, the following occurred:

Mr. Coates [attorney for Continenal]: Aren't we now arguing semantics, Your Honor?

The Court: I take it most of this case involves the semantics of the terms used in this policy. Had the policy been more specific in several regards, a lot of the issues in this case wouldn't arise. [Jnt. App. 88a.]

Summary of Hersent's Argument

The alleged warranties in the Plan are too vague to be legally enforceable. At most, they require Hersent to select a person to exercise "judgment." Hersent properly selected Robert Green. If he negligently exercised his judgment, which Hersent denies, his negligence is covered under the Inchmaree clause of the policy and not imputed to Hersent. (Continental makes no claim that Hersent did not exercise due diligence in choosing Green to exercise "judgment" under the warranties.) Hersent further denies that the weather circumstances necessary to trigger the Plan ever occurred, or if they did, that it failed to comply with the procedures outlined in the Plan.

Rules of Construction and Their Application Here

Breach of warranty in a time insurance policy suspends the policy for the duration of the breach. A lack of a causal relationship between the breach and a loss is legally irrelevant. *Red Top Brewing Co. v. Mazzotti*, 202 F.2d 481 (2d Cir. 1953).

Because a breach of warranty has such drastic effect, amounting to forfeiture, the courts have held that the language of a warranty must be construed strictly against the underwriter. This is especially true in *time* insurance policies. *Henjes v. Aetna Insurance Co.*, 132 F.2d 715, 719 (2d Cir. 1943). New York law is the same. *County of Schenectady v. Travelers Insurance Co.*, 48 A.D.2d 299, 368 N.Y.S. 2d 894 (3rd Dept. 1975).

Application of these principles of construction in favor of the insured is particularly appropriate here because the Plan contained the following sentence, which permitted Continental unilaterally to change or expand it even after the insurance took effect:

It is understood and agreed that the Company, at any time, may revise or add to the conditions of this plan, by issuance of an endorsement.

Continental never took advantage of this opportunity to revise the warranties.

Is Condition B a Warranty?

The Plan Continental presented to Hersent lists a series of escalating weather conditions with concomitant procedures for Hersent to follow as the conditions become more grave. The words of the Plan are vague. They do not require mechanical responses to quantifiable weather conditions, clearly triggering those responses. They require judgment and evaluation.

For example, condition *A* speaks of a hurricane "approaching" Hatteras with the "possibility" of passing through or "in the vicinity" of the area. If condition *A* is invoked, Hersent is required to do certain things, including tow the barge to a safe berth, "preferably" Port Jefferson.

Condition *B* is a hurricane or northeast storm "well offshore." If Condition *B* is forecast to be "quite severe," certain action must be taken. "If possible," certain additional action with regard to the mooring lines must be taken. There are additional requirements if conditions become "unduly severe."

Condition *C* is a warning status with "severe" squall weather. If it occurs, Hersent is required to take certain action to secure the crane booms, using extra guys, "if warranted." Tugs will be available in case conditions "deteriorate."

Evaluation is also needed to determine the appropriate response even after a particular weather condition is

judged to exist. For example, if Condition B is judged to exist, it is still necessary to determine what must be done to "secure" the crane boom "in place," to "secure" the gear against "movement," and how much to "slack off" the mooring lines so it is "enough" to allow the vessel to swing for "better" riding.

These provisions, Hersent contends, are too ambiguous to qualify as warranties. The Court in *Kalmbach, Inc. v. Insurance Company of Penna, Inc.*, 529 F.2d 552, 556 (9th Cir. 1976) said in construing the much clearer sentence: "It is further understood and agreed that this extension of movement will be subject to approval of Captain Logan and further subject to a satisfactory long range weather forecast":

At the outset, we are at a loss to understand the meaning of the questioned provision. Among other things, we note the following imperfections: (1) upon whom was the burden of securing the Captain's approval; (2) when was the approval to be delivered; (3) to whom was the approval to be delivered; (4) what was the Captain to approve, the hulls of the respective vessels, the route of the voyage, or what have you? With reference to securing a "... satisfactory long range weather forecast", (a) who was responsible for securing the forecast; (b) when was the forecast to be obtained; (c) when obtained, to whom was the forecast to be delivered, if at all?

The alleged warranties here raise similar questions. Continental was free to draft them as it wished. It should not, after the loss, be allowed to second guess the meaning of the ambiguous words it used, under pain of forfeiture. The alleged warranties are instructive (not prescriptive) precautions. Their language is not capable of objective and clear definition.

The differences between the alleged warranties here and in *Kalmbach* and those in, for example, *Kron v. Hanover Fire Insurance Co.*, 20 A.D. 2d 670, 246 N.Y.S. 2d 848 (2d Dept. 1964) *aff'd w/o op.* 15 N.Y. 2d 521, 254 N.Y.S. 2d 119 (1964), are important. In *Kron*, the underwriter successfully defended an action on the ground that the plaintiff had breached a warranty that gasoline would not be kept on board the vessel. Gasoline was kept on board the vessel. The policy was therefore suspended. No judgment was necessary to fulfill the *Kron* warranty.

Continental contends (at p. 13 of its brief) that Hersent "produced no witness nor extrinsic evidence of any type to substantiate its contentions as to ambiguity in the wording of the Plan." This is false. Walter Zeltmann, a meteorologist called by Hersent, testified extensively on the ambiguities. (Jnt. App. 51a-53a.) Continental's weather expert also testified that the phrase "northeast storm," contained in condition B, is not one that can be found "in the forecasts." (Jnt. App. 61a.)

Although expert testimony is useful on the ambiguity of technical words, many of the words here are used for their everyday meaning (e.g., "unduly," "fairly," "secure," "quite," and "better"). The court can conclude as a matter of law that they are too ambiguous to have a forfeiture effect. *Kalmbach, Inc. v. Insurance Company of Penna, Inc.*, *supra*. Indeed, Continental's counsel recognized this at trial, when he objected to questions about the meaning of words in the Plan:

Your Honor, if he is going to call from this witness for his interpretation of language, which I think should be for the fact finder here, the semantics, I am going to object. If it is strictly meteorological language, okay.

The Court: I take it he is going to ask him when the weather conditions constitute either a hurricane or a storm offshore.

Mr. Coates: If he goes into that, all right, but if he gets into the meaning of certain phrases other than meteorological phrases, I will object. It is your province. [R. 126.]

The trial judge properly concluded that portions of the Plan "are so vague and judgmental as to not constitute warranties. It may set up a condition or a standard for due diligence, but certain portions of it are not sufficiently clear to allow in effect a forfeiture of the policy because of failure to comply." (R 780-81.)

If the Plan States a Warranty, What Did It Warrant?

Even if the Plan can be construed to contain a warranty, the lower court concluded that it requires only that Hersent appoint someone to evaluate the weather conditions and procedures outlined in the Plan and make a "judgment" (CL 15). This conclusion is based on the following sentence in the policy, located at the end of the Plan:

It is further warranted by the Assured that one person will be designated responsible for making *judgments* as to the *severity* of conditions, and to see that the *proper* procedures are followed. (Emphasis added.)

The text of the Plan, aside from its ambiguities, further supports this conclusion. If the procedures outlined in condition B constitute a warranty despite the existence of the requirement that Hersent appoint someone to make "judgment," then the requirement that such a person be appointed is surplusage. For even if such a person were appointed and acted reasonably, the policy would still be forfeited if the procedures in condition B were not literally complied with. In other words, there would be no reason, from Continental's viewpoint, to require Hersent to appoint someone to exercise "judgment," if, regardless of what that

person did, failure to comply with condition B's procedures forfeited the policy. The Court will not read the policy more strictly against the insured than necessary. *Henjes v. Aetna Insurance Co.*, *supra*, 132 F.2d at 719. *Kalmbach, Inc. v. Insurance Co. of Penna., Inc.*, 529 F.2d at 556.

If, finally, this Court concludes that the procedures outlined in condition B were warranties and not followed, Hersent is still protected under the "negligence of master" coverage in the Inchmaree clause. *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Penna.*, 247 F.2d 116, 123 (5th Cir. 1957); *Kalmbach, Inc. v. Insurance Co. of Penna., Inc.*, *supra*. Hersent shows under Point V below that Green was a "master" under the Inchmaree clause.

Condition B Was Never In Effect

The trial court concluded that condition B, whether or not it was a warranty, never came into effect because the weather circumstances it ambiguously defined never occurred (CL 10). Therefore, Hersent was under no obligation to follow the procedures under condition B. Condition B states: "defined as an alert condition with a hurricane or northeast storm well offshore. Heavy swells can be expected from the East and Northeast, causing a vessel moored to roll heavily." The trial court concluded (CL 10):

With respect to condition B of the Storm and Heavy Weather Plan of the Hull Policy: the phrase "well offshore" is ambiguous; if, however, it refers to the pressure center of the eastern segment of the storm, then the storm was "well offshore." The "heavy swells" did not occur, both because the storm didn't begin as a northeaster, and because Jacobs Point, where barge number 136 was moored, is somewhat sheltered by the neck of Long Island that runs to the northeast.

There is support for the conclusion that the phrase "well offshore" is ambiguous. (Jnt. App. 52a.) There is support for the conclusion that "heavy swells" did not occur because of the geography of the work site. (Jnt. App. 53a.) Therefore, the court's conclusion that condition B was not in effect is supported by the record and any failure to comply with the procedures outlined in the condition is irrelevant.

Hersent Complied With the Procedures In Condition B

The court found, alternatively, that Hersent complied with the procedures in the subparagraphs of condition B (CL 10, 11, 12, 13.) It also ruled that if the language of condition B "is sufficiently definite to constitute a set of warranties, [it] must be construed strictly against Continental." This is especially true in a time insurance policy. (CL 14.) *Henjes v. Aetna Insurance Co.*, *supra*. We consider each subparagraph of condition B.

B(1). This subparagraph states: "If conditions are forecast to be quite severe, crane booms will be lowered and cradled, and secured in place." The trial court ruled that if a northeast storm existed during the weekend of December 15 to December 17, 1972, it "was not 'quite severe' within the meaning of subparagraph 1 of condition B; therefore, there was no breach of subparagraph B(1) by Hersent." This conclusion is supported in the record. (Jnt. App. 55a.) The court also held that, in any event, "the crane boom was 'lowered, cradled, and secured in place' (albeit not lashed in place; if the word 'secured' was meant to mean lashed, or secured by the boom fall, the policy should have so stated). . . ." The trial evidence supports a finding that the boom was "secured" (Jnt. App. 212a, 214a, 199a-200a, Pl. Ex. 11A). *Cf. Union Investment Co. v. Fidelity & Deposit Co. of Maryland*, 549 F.2d 1107, 1110 (6th Cir. 1977).

Continental argues (at p. 16 of its brief) that subparagraph B(1) was breached because Hersent no longer secured the boom after it was lengthened by 10 feet (FF 24) in the same way in which it had secured the boom before. But this is not what the policy required. It required only that the boom be "secured," not that it be secured in any particular way. Continental argues that because the crew translated the provisions of subparagraph B(2) that "gear and equipment on deck will be secured against movement," by lashing these items (FF 33), the word "secured" in subparagraph B(1) should also be interpreted to require lashing. But Continental ignores the fact that the word "lashing" is used in subparagraph A(1) with respect to the boom, while the word "secured" is substituted for "lashing" with respect to the boom in connection with the calmer weather conditions defined under condition B. Furthermore, "gear and equipment" differ from a "boom." The fact that one lends itself to lashing in order to be "secured," does not mean that the other must also be "secured" in the same way.

B(2). Continental does not contend that this subparagraph was breached.

B(3). This subparagraph states in full: "Aft mooring lines will be slacked off enough to allow vessel to swing head into the seas and swells for better riding. If possible, vessel will be allowed to ride to head line moorings and anchor with fairly equal strain on each unit." The trial court concluded:

Subparagraph 3 of Condition B is extremely ambiguous. It refers to "aft mooring lines." It is unclear which were the fore and the aft ends of barge no. 136. It was obviously more essential that the mooring lines leading to the north—toward the construction site—be slacked off than it was that the lines leading to shore be slacked off, because the barge could not swing

unless the mooring lines toward the construction site were slacked off. If that be the interpretation given to "aft mooring lines," then Hersent complied by slackening them off. Moreover, the phrase "if possible, vessel will be allowed to ride head line moorings and anchor with fairly equal strain on each unit" is not a warranty; it is not even a condition—merely a desired result. In any event, Hersent complied with the direction in this subparagraph. (CL 12).

Continental argues that there is no ambiguity about which were the barge's aft mooring lines. (Continental brief, p. 14).

The evidence shows otherwise. The following is from the testimony of Robert J. Green. The questioner is Timothy Hanan, Esq. one of Continental's attorneys.

Q. At the conclusion of the day, in what general compass directions would the barge have been located on the evening of the 14th?

A. North and south.

Q. Which direction would the bow be headed? You are hesitating. Explain the difficulty you have with respect to bow and stern.

A. It was a double rigged barge and strangely, what they considered the bow, I considered the stern.

Q. I agree with you a hundred percent. (Jnt. App. 198a).

The following testimony is from Captain Smith, called by Continental:

[Captain Smith]: The stern, as I recall, was—

Q. [By Mr Coates] Let's—I think it would be easier to talk about the north end and the south end, because

different people have called the bow the stern and vice-versa. (Jnt. App. 69a)

Continental also argues that the mooring lines were "left taut" and not "slacked off," as required by B(3). Continental wishes the benefits of the ambiguity. In fact, a direction that mooring lines be "slacked off enough" to achieve a desired result "for better riding" demands judgment. This is especially so because of the danger that if the lines were too slack, the barge could hit the work project. (Jnt. App. 152a-153a; 172a). Furthermore, there was evidence that the aft lines, as the judge construed the term "aft," had 1,000 feet of length, out of a potential 1400 feet (FF 34, Jnt. App. 72a, 75a, Pl. Ex. 7B). Although one witness testified that the lines were drawn tight on December 14 (Jnt. App. 198a) and another remembered that the lines were left taut when the crew disembarked the following day (Jnt. App. 151a), the question whether the lines were slack "enough" so that the barge could ride "better," is one of fact and degree. The record supports a finding that the aft mooring lines were sufficiently slack.*

B(4). This subparagraph states: "An alert will be given for tugs to stand-by in case conditions become unduly severe and assistance be required." The trial court concluded:

With respect to subparagraph 4 of condition B: subparagraph 4 is not a warranty; at most, in light of the nebulous language of the clause, it is a condition. However, even if subparagraph B(4) does constitute a warranty, it was complied with by Hersent, at least

* There was also some criticism of Green for leaving the barge moored with the southerly line crossed and the northerly lines breasted. The judge concluded that this was "imprudent from a seaman's standpoint." (FF 51.) Nevertheless, the issue of degree of slack is separate from the issue of crossing mooring lines.

until barge number 136 had capsized. An alert was given to have the tug Paumanok stand by, and it did stand by up until 3 p.m. on Saturday. Although no alert was given to have the Paumanok stand by on Sunday, the barge number 136 had capsized by early Sunday morning. (CL 13.)

Captain Wildner of the tug Paumanok testified that Mr. Green instructed him to stand by to keep "an eye on the weather conditions in the inlet" and "to observe it with binoculars to see how the barge was riding with the weather." He last observed it between 3 and 4 on Saturday afternoon. The barge "seemed to be riding in the weather very well." It was riding "the way the sea was riding by it." Wildner testified that he "definitely would have contacted" Green if anything had been wrong. He had instructions to do so if "the weather broke." He had one or two telephone conversations with Green on Saturday. (Jnt. App. 156a-158a; FF 43.)

Given the weather conditions on Friday and Saturday, Captain Wildner testified that he did not believe that, had he been able to maneuver the tug to the barge, he could have placed men on the barge (Jnt. App. 180a) although this would have been necessary to bring the barge in (Jnt. App. 177a). He also testified that even if men could have been placed on the barge, "you could have lost a life or a leg trying to put somebody on." He concluded, "I don't think it would have been safe." (Jnt. App. 180a.)

Hersent contends that this evidence constitutes "standing by" within the meaning of B(4). Continental argues (at pp. 15-16 of its brief) that this conduct does not constitute standing by because it "was feasible" to have the "tug hanging from 'Buoy Mike,' " rather than at Mattituck Inlet, "miles away." It also argues that "it would have been

feasible" to bring the tug alongside the barge, although Continental fails to mention Captain Wiloner's testimony that he could not have put anyone on the barge given the sea conditions and that there was danger in trying to do so. In short, Continental contends that because assistance could not reach the barge, the tug, "in the context of the Plan, was not standing by."

The answer to Continental's argument is that Hersent never guaranteed that assistance would always be able to reach the barge. Situations could arise making assistance impossible. The Hull policy could have specified that Hersent takes the risk of those situations. The policy could have specified that "stand by" means to stand by at "Buoy Mike". The policy could have said that Hersent must bring a tug to the barge even if it means physical danger. But the policy didn't say any of this. Even if "stand-by" can be defined with sufficient particularity to constitute a warranty, it has no single, fixed meaning. The trial evidence amply supports a conclusion by Judge Goettel that Hersent complied with B(4) by observing one reasonable meaning of "stand by."

The Trial Court's finding with regard to condition B is not subject to reversal unless it is clearly erroneous. . . . the evidence presented to the district court fairly supports the court's conclusion; accordingly, the district court's finding [should] not be disturbed." *Champion International Corp. v. Continental Casualty Co.*, 546 F.2d 502, 506 (2d Cir. 1976).

IV.

Hersent did not breach an implied warranty of seaworthiness.

Continental contends (in its Point III) that Hersent breached an implied warranty of seaworthiness. This is incorrect. There is no implied warranty of seaworthiness in a time insurance policy. To the extent that one can be inferred from some cases, it is narrow and was not breached here.

The decisions dealing with this issue primarily come from the Second and Fifth Circuits. The Second Circuit decisions are more favorable to Hersent, although Hersent would prevail under the decisions of either Circuit. Notably, Continental does not cite the Second Circuit decisions under its Point III.

The fact that a vessel is unseaworthy does not in itself exclude it from coverage under a maritime insurance policy containing an Inchmaree clause. This is because the Inchmaree clause protects against various perils that could render the ship unseaworthy. *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Penna.*, 247 F.2d 116, 123 (Brown, J.). *In re Gulf & Midlands Barge Line, Inc.*, 509 F.2d 713 (5th Cir. 1975). *Saskatchewan Government Insurance Office v. Spot Pack*, *supra*, 242 F.2d at 392. As Judge Brown said in *Tropical Marine*: "For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause." 247 F.2d at 123.

Continental must show that there is an implied warranty of seaworthiness, that it was breached and that it was breached as a result of a condition not contained in the Inchmaree clause of the Hull policy. It has failed to do any of these three things.

***There Is No Implied Warranty of Seaworthiness
In a Time Policy***

There is no *express* warranty of seaworthiness in the Hull policy. The allegation of unseaworthiness raises the issue whether the courts will imply a warranty of seaworthiness in a time insurance policy. There is an arguable conflict between the Circuits. The leading Second Circuit case is *New York, New Haven & Hartford Railroad Co. v. Gray*, 240 F.2d 460 (2d Cir. 1957). The Court noted that, in accordance with the English rule, "appellees [insurance companies] correctly disclaimed defense of an implied warranty of seaworthiness, since these are time policies." 240 F.2d at 466, and n.10.

The English rule is that a warranty of seaworthiness will not be implied in a time insurance policy. The Fifth Circuit has taken the position that "in a rare departure from a determined course of parallel uniformity," the English rule has been modified in American maritime jurisprudence. *Saskatchewan Government Insurance Office v. Spot Pack*, 242 F.2d 385 (5th Cir. 1957). According to *Spot Pack*, American courts will imply

a warranty of seaworthiness as of the very moment of attachment of the insurance. And, unlike the English Rule which limits the warranty to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to be kept in a seaworthy condition,

or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative that the owner, *from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition.* And, unlike a breach of warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this "negative" burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness. [242 F.2d at 388.] (Emphasis added.)

In *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Penna.*, *supra*, the Fifth Circuit further complicates the inter-Circuit division first by limiting the "negative" warranty to *knowledge*, deleting the reference to "bad faith or neglect," * and then by seeing no difference between its *Spot Pack* decision and the Second Circuit rule in *Gray*:

But as we [*in Spot Pack*] and the Second Circuit [*in Gray*], by almost simultaneous decisions have recently pointed out, the owner's obligation under a time policy, as was this one, is extremely limited: The vessel is seaworthy at the attachment of the insurance, but henceforth it is a sort of negative warranty, i.e., the owner or those in privity with him will not knowingly send a vessel to sea in a deficient condition. [247 F.2d at 119.]

In sum, *Spot Pack* establishes an implied warranty of seaworthiness: (1) that the vessel is seaworthy when the

* "If it is assumed [that the ship left harbor] in an unseaworthy condition, there is absolutely none that the Shipowner or anyone in privity with it knew of that." 247 F.2d at 120. See also 247 F.2d at 119.

policy attaches; and (2) that the owner "from bad faith or neglect" will not knowingly send the vessel to sea in an unseaworthy state. *Tropical Marine* omits the quoted phrase. The Second Circuit has expressly rejected (1) in *Gray*. A limited version of (2) was argued for in *Gray*, when the underwriter contended that the English Rule itself had been codified to require that "where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." The Court assumed the correctness of this summary of the law but held it irrelevant on the facts before it. 240 F.2d at 466.

Add to all this the following contention of Gilmore and Black after reviewing these cases and the applicable law:

No case has been found squarely basing decision on the so-called "American Rule," and the guess is ventured that the Supreme Court, if the issue is even tendered it, will not uphold this warranty. [Gilmore and Black, *The Law of Admiralty* 65 (2nd ed. 1975).]

Hersent maintains that under these authorities, in the Second Circuit, there is no implied warranty of seaworthiness in a time insurance policy.

***If There Is an Implied Warranty of Seaworthiness,
It Was Not Breached Here***

If there is an implied warranty of seaworthiness, it is only that Hersent did not "knowingly" send the barge to sea in an unseaworthy state. In fact, *Frederic Starr Contracting Co. v. Aetna Insurance Co.*, *supra*, 285 F.2d at 109, requires "wilful misconduct" by the insured.

The knowledge or wilful misconduct must belong to the owners of Hersent, not the masters or crew of the barge. In *Spot Pack*, even the Fifth Circuit, which takes a view

more favorable to the underwriter, agreed quoting from *Compania Transatlantica Centroamericana, S.A. v. Alliance Assurance Co.*, 50 F.Supp. 986, 991 (S.D.N.Y. 1943) (Rifkind, J.), that it is only "where, with the *privity of the assured*, the ship is sent to sea in an unworthy state" does the underwriter escape liability. 240 F.2d at 466 (emphasis in the original). *Accord: Tropical Marine Products v. Birmingham Fire Insurance Co.*, 247 F.2d at 122.

Continental contends (at p. 20 of its brief) that the trial judge "rendered no conclusion having to do with the breach-of-implied-warranty issue." This is untrue. The trial judge found as a fact that Hersent fully complied with its warranty that the barge would be inspected by HCS (a company wholly owned by Continental through MOAC) (FF 9, 10, 11). The Court also found that when the Hull policy became effective, when the barge left Cartaret, New Jersey, and when the barge was inspected by Captain Smith of HCS, it was adequate for its intended service. (FF 12, 13, 14, 15.) These findings are supported in the record (Jnt. App. 78a, Def. Ex. G, H). Judge Goettel then concluded that Continental did not meet "its burden of proving any exceptions to coverage under the Hull policy" (CL 21). The issue of an implied warranty of seaworthiness was before Judge Goettel, he made supported findings of fact with regard to it and he concluded as a matter of law that "no exceptions to coverage" were proved. Any claim otherwise is baseless.

The finding that the barge was adequate for its intended purpose means that it was seaworthy. *Aguirre v. Citizens Casualty Co. of New York*, 441 F.2d 141, 144 (5th Cir. 1971) (a ship is seaworthy if it "is reasonably fit for the intended use.")

Continental argues that even if the barge was fit for its intended use when the policy attached, it became unsea-

worthy when an extra ten feet were added to the boom. (Continental's brief, p. 20.) As has been shown (Jnt. App. 91a), Continental was on notice that Hersent might and could add an additional ten feet to the boom. It never instructed otherwise. Furthermore, there was no trial testimony showing that the additional ten feet made the barge unseaworthy. Rather, the testimony was that it would have no negative effect. (Jnt. App. 80a).

Continental also asks this Court to infer that because, after the barge had overturned, hatch covers were loose or missing, that they were loose or missing before the capsizing two weeks earlier when the barge left Mattituck. The trial judge made no such finding, and the trial record contains no evidence that would support this inference back.

Even under the most expansive interpretation of an implied warranty of unseaworthiness, Continental has not proved that the barge was unfit for its intended purpose when the insurance attached or that it ever became seaworthy, let alone "with the privity of the assured."

Unseaworthiness Is Insured Against

Under *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Penna.*, *supra*, 247 F.2d at 123, even if the barge did become unseaworthy during the time the policy was in effect, this unseaworthiness itself may be insured against. For example, if the unseaworthiness results from the "negligence" of certain people, or if it results from "latent defects," it is covered by the Inchmaree clause. *Spot Pack*, *supra*, 242 F.2d at 392. Thus, it was further incumbent upon Continental to prove that the alleged unseaworthiness arose from a cause outside the coverage provided by the Inchmaree clause of the policy and that

this "excluded" unseaworthiness caused the loss. It proved neither of these things.

V.

Robert J. Green was master of the barge within the meaning of the Inchmaree clause of the policy.

Continental contends (under its Point IV) that Robert J. Green was not a master of the barge, but a "manager" of Hersent within the meaning of the Inchmaree clause of the policy. The trial court found that Green was the master of the barge (CL 8). Hersent will show that this finding is amply supported by the record. Furthermore, if the proximate cause of the loss was a storm within the meaning of the *perils of the sea* clause of the policy, the fact that Robert J. Green may be a "manager" of Hersent who failed to exercise "due diligence" will not avail Continental. The limitations of the due diligence clause of the policy only apply if the loss results from a peril contained in the expanded coverage of the Inchmaree clause. *Northwestern Mutual Life Insurance Co. v. Linard*, 498 F.2d at 563 n.10.

The record supports the trial court's finding that Green was the barge's master. Green was present on the barge on a daily basis (Jnt. App. 191a). Green supervised everyone else on the barge, including Frank Carr, the dock-builder's foreman, whom Continental contends was the "master." (Jnt. App. 194a.) Indeed, Frank Carr himself testified that it was Green who gave orders to work or not to work on Saturdays, that it was Green who directed the crew to depart the barge on December 15, and that it was Green who had made the decision to depart the barge on prior occasions (Jnt. App. 215a, 217a.) It was Green who instructed the tug to stand by during the weekend of December 15th (Jnt. App. 206a, 156a). Frank Carr and every-

one else on the barge worked under Green's direction (Jnt. App. 210a). Green had been supervising similar work for Hersent for approximately twenty years (Jnt. App. 93a).

The leading case on the definition of "master" under the Inchmaree clause is *Allen N. Spooner & Son, Inc. v. Connecticut Fire Insurance Co.*, *supra*, 314 F.2d at 757-58. See also *Spot Pack*, *supra*, 242 F.2d at 392. In *Spooner*, a man named Stasch chartered a barge to raise a sunken tanker "from the East River where it lay in about 60 feet of water approximately mid-channel between the Brooklyn and Manhattan Bridges." One day, while Stasch himself was directing operations, one of the guy wires supporting the crane that was on the barge parted "and the crane collapsed and was lost over the side. The hull of the barge was so severely damaged by the collapse of the crane that it was concededly a constructive total loss." 314 F.2d at 754. The Court concluded that Stasch had been negligent.

The insurance company contended that it was not liable because Stasch's negligence amounted to a "want of due diligence" by the owner or manager of the vessel. The Court of Appeals concluded that Stasch was at least the "master" of the barge and assumed "arguendo" that as the charterer he was also "an owner or manager for purposes of the exclusion clause." 314 F. 2d at 757-58.

But the Court said:

We are persuaded that that exclusion was not intended to apply to the negligence of an owner who was acting as master in the operation of a vessel at sea. [314 F. 2d at 758.]

The Court continued:

Where the owner or charterer of the vessel also acts as its master, the distinction drawn by the [Inchma-

ree] clause can be given effect only if it is read as referring to the function that the owner-master is performing when the acts causing the accident take place. . . .

The language of the clause as a whole reflects a recognition of the different treatment to be accorded seagoing and preparational carelessness. There is no other explanation for the use of the term "negligence" in referring to the master, and of the term "want of due diligence" in referring to the owner. Clearly the draftsman had quite different operations in mind. We conclude that the Inchmaree clause was designed to insure against seagoing or operational negligence of the master (whether or not he is also the charterer or owner), and to exclude from coverage damage due to the shoreside failure of the shipowner's managerial staff properly to prepare or equip the vessel for the voyage or service she is about to perform. [314 F. 2d at 758.]

In *Spot Pack, supra*, the master of the vessel failed to replace certain circuit breakers. As a result, the ship sank. The underwriter argued, among other things, that "when the Master and Engineer decided to postpone re-installation of the circuit breaker . . . they were acting not as Master and Engineer, but somehow in the capacity of vicarious owners or shoreside management." 242 F. 2d at 392 n.8. The Court rejected this argument, responding:

By its language, context, purpose and specific terms which exclude the Master and crewmembers from the status of "owners" *even though they, in fact, own interests in the vessel*, this . . . refers only to acts of which the owner has privity and knowledge. [242 F. 2d at 392.] [Emphasis added.]

Continental makes much of the fact that Green's intra-corporate title was "Project Manager" and that he had shoreside as well as seaside responsibilities. Continental called as a witness a Thomas Doyle, a former Hersent employee who had worked as a welder on the barge. Doyle testified, in substance, that he had taken his orders from Carr (Jnt. App. 145a-146a). On cross-examination, he testified as follows:

Q. Who gave orders to Mr. Carr?

A. I would have to presume Mr. Green. (Jnt. App. 148a.)

Frank Carr's testimony was that he took his orders from Green:

Q. Who was the superintendent?

A. Robert Green.

Q. Did he work under your direction or did you work under his direction?

A. I worked under his direction.

* * *

Q. Was there anyone on the site and employed by Hersent who supervised Mr. Green, to your knowledge?

A. No one on the barge. (Jnt. App. 210a.)

Joseph Miller, Hersent's site manager at the project (Jnt. App. 31a), testified that Green's presence was "required on the barge on a daily basis" and that when he was on the barge, he "was in charge of the barge and of all decisions." (Jnt. App. 33a.) While shoreside, Green used the same office as Miller and, in fact, used the very same desk, which "principally" belonged to Miller. (Jnt. App. 35a.) Miller "took care of the administrative work

and Mr. Green was strictly concerned with the building of the platform." (Jnt. App. 35a.)

If under *Spooner*, an owner can be a master, then here, the shoreside administrative tasks Green had does not take away from the fact that he was also the master of the barge. Indeed, it is strange for Continental, which accepted the appointment of Green as the person responsible for making a host of seamanship decisions under the Storm and Heavy Weather Plan, now to contend that he was a shoreside manager all along. *Spooner* and other cases make it clear that the issue turns not on title but on function. The decisions Green made to prepare the barge to weather the storm were operational decisions, not managerial ones. Furthermore, Continental has shown no lack of due diligence on Green's part in connection with any managerial functions he may have had. The only relevant fact finding by the court was that Green's decision on how to moor the vessel was "imprudent from a *seaman's* standpoint," not a managerial one. (Emphasis added.) Continental has shown no decision by Green reflecting a failure "properly to prepare or equip the vessel for the voyage or service she is about to perform." *Spooner, supra*, at 758. If Green acted negligently in mooring the barge or in failing to foresee the strength of the storm, it was "operational" negligence. It did not result from a failure by Hersent to "properly . . . equip the vessel." Accordingly, his negligence, if any, is insured against under the Inchmaree clause.

Finally, even if Green did fail to exercise diligence and was acting in a managerial capacity, this would not help Continental. The limitations in the *due diligence* clause only apply to the expanded coverage of the Inchmaree clause and not to losses caused by risks defined in the *perils of the sea* clause. Here the trial court found

that a peril of the sea, a storm, proximately caused the loss. *Frederick Starr Contracting Co. v. Aetna Insurance Co.*, *supra*, 285 F.2d at 109.

CONCLUSION

The interlocutory judgment finding Continental liable on the Hull policy should be affirmed and the case remanded for determination of damages.

Respectfully submitted,

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Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JOHN BYRNES, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2159 42ND ST
ASTORIA, N.Y.

That on the 20 day of MAY, 1977,
deponent personally served the within BRIEF FOR
DEFENDANT-APPELLEE
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

MACKLIN HANAN + MC KERNAN
ATTORNEYS FOR PLAINTIFF-APPELLANT
61 BROADWAY
NEW YORK, N.Y.

Sworn to before me this

20TH day of May, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

